

DIANE M. REYNOLDS and RODNEY REYNOLDS, her husband, PLAINTIFFS VS ROHIT SHUKLA, M.D. and WAYNESBORO HOSPITAL, DEFENDANTS, Franklin County Branch, Civil Action-Law No.A.D. 1991 - 521

SUMMARY JUDGMENT

*Defendant hospital filed a motion for summary judgment in negligence action. Plaintiff alleged that a piece of surgical glove was left inside her body during surgery performed at defendant hospital. Hospital offered oral testimony of three nurses who were present at the subject surgery who deny being the source of the glove piece. The court denied summary judgment holding that factual issues remained unresolved.*

1. Summary judgment may be granted only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.
2. In ruling on a motion for summary judgment the court must examine the record in a light most favorable to the party opposing the motion.
3. Summary judgment is not appropriate where the evidence is based upon oral testimony of the moving party.

*Richard L. Kearns, Esquire, Attorney for Plaintiffs*

*Joseph A. Ricci, Esquire, Attorney for Defendant*

*Waynesboro Hospital*

*Evan Black, Esquire, Attorney for Defendant Shukla*

OPINION

William H. Kaye, J., December 21, 1995

In the instant proceeding, Diane M. Reynolds and Rodney Reynolds ("plaintiffs") seek monetary damages from Rohit Shukla ("Dr. Shukla") and Waynesboro Hospital on the assertion that Dr. Shukla committed medical malpractice when he performed surgery on Mrs. Reynolds on August 27, 1986 by leaving a piece of a surgical glove inside her body at the site of the surgery. Waynesboro Hospital has filed a motion for summary judgment, which plaintiffs and Dr. Shukla oppose. Following receipt of briefs and oral argument, the matter is in a posture for disposition.

With respect to the motion, the Pennsylvania Rules of Civil Procedure provide in relevant part as follows:

- (a) After the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings and

any depositions, answers to interrogatories, admissions on file and supporting affidavits.

- (b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.

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Pa.R.C.P. No. 1035.

Under the Rule, summary judgment may be granted only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Goodrich-Amram 2d §1035(b):3*. The moving party has the burden of establishing the absence of any disputed material fact. *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989). Summary judgment will be granted only where the pleadings, answers to interrogatories, admissions, and affidavits clearly and without doubt establish the right to such judgment. *McNeal v. Easton*, 143 Pa.Cmwlt. 151, 598 A.2d 638 (1991). In ruling on the motion, the Court must examine the record in the light most favorable to the party opposing the motion, *Penn Center House, Inc., supra*, and must accept as true all well-pleaded facts in the opposing party's pleadings, *O'Neill v. Checker Motors Corp.*, 339 Pa.Super. 430, 567 A.2d 680 (1989). All reasonable inferences must be drawn in favor of the party opposing the motion. *Id.*

The limited record before us for disposition of this motion indicates that Diane M. Reynolds underwent surgery at Waynesboro Hospital in 1974 for removal of her spleen, and on August 27, 1986 for an exploratory laparotomy; lysis of adhesions; and an

appendectomy. On April 5, 1990, she underwent surgery at Chambersburg Hospital, at which time it was determined that a piece of surgical glove was in her abdomen, and it had perforated her colon. Plaintiffs assert that the piece of glove was located inside the abdominal cavity due to the earlier surgery, and that it was not discovered and removed in that prior surgery due to the negligence of the defendants.

Three nurses who assisted Dr. Shukla in the 1986 surgery were deposed on August 13, 1992, and each denied being the source of the piece of glove found inside Mrs. Reynolds though, not surprisingly, none could recall the details of the surgery that had taken place six (6) years previously.

In the present posture of this case, plaintiffs have pleaded that a piece of surgical glove was found inside Mrs. Reynold's abdomen a number of years after Dr. Shukla had performed surgery on her at Waynesboro Hospital while being assisted by three hospital nurses. All of the participants in the surgery deny knowledge of how this material came to be in this position. Nonetheless, at this juncture, and applying the standards set forth above for ruling on this type of motion, we must accept as true that the material was in Mrs. Reynold's abdomen, and that it could only have gotten there during a surgical procedure. For us to grant the Hospital's motion, we would, at the very least, have to accept as true the oral testimony of the nurses who were employed by the Hospital to assist in the surgery. *In Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), it was held that summary judgment is not appropriate where the evidence is based upon oral testimony.

The Nanty-Glo rule means that: "Testimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the jury."

*Penn Center House, Inc. v. Hoffman*,  
520 Pa. at 176, 553 A.2d at 903,  
citing *Goodrich-Amram 2d* §1035(b):4.

In the instant case, there obviously are factual disputes which exist. While the witnesses whose depositions were taken deny knowledge of anything which could have caused a piece of surgical glove to lodge in the plaintiff's abdomen during surgery, on the "facts" now properly before us for this ruling, we infer that object was found therein, obviously *something* caused it to be there. Under the "Nanty-Glo rule", it would be improper for the motion to be granted based upon the oral testimony of the Hospital's employees alone. It will be for the finder of the facts to determine the issue of liability based upon what they determine the facts to be.

#### ORDER OF COURT

NOW, December 21, 1995, the motion for summary judgment filed by Waynesboro Hospital is hereby DENIED.